**Catherine's, Inc. *and* United Steelworkers of America, AFL–CIO–CLC, Petitioner.** Case 26–RC–7611

January 31, 1995

## DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 24, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 48 for and 35 against the Petitioner, with no undetermined challenged ballots.

The Board has reviewed the record in light of the exceptions and brief,[1] has adopted the hearing officer's findings[2] and recommendations,[3] and finds that a certification of representative should be issued.

In adopting the hearing officer's recommendation that the Employer's Objection 3 be overruled,[4] we stress that this case is distinguishable on the facts from the recent court decision in *KI (U.S.A.) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994). In that case, the court sustained the objection of the employer, a wholly-owned subsidiary of a Japanese corporation, based on the union's distribution of literature on the day before the election in which a Japanese businessman who had no connection with the employer expressed ''his very negative views regarding American workers.'' Here, Union Representative Barton's alleged objectionable comments were not of an inflammatory nature and did not occur on the election eve, they were not part of a recurrent or persistent campaign appeal to the religious or racial prejudice of the eligible voters, and the Union did not reiterate the subject in its campaign literature.

Additionally, we note that the present case is also distinguishable from our recent decision in *Zartic Inc.*, 315 NLRB No. 63 (Oct. 31, 1994), in which the election was set aside based on the union's sustained appeal to the ethnic sensibilities of the employer's Hispanic employees which was so inflammatory that it resulted in a near riot at one of the employer's campaign meetings. Thus, while Barton's gratuitous comments in this case clearly were not germane to the Union's organizing campaign and we certainly do not condone the introduction of irrelevant religious and racial issues, we find them insufficient to warrant setting aside the election as they were isolated and lacked inflammatory appeal.

## CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steelworkers of America, AFL–CIO–CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time regular associate warehouse employees, including shipping and receiving employees, line employees, RTW employees, pic-pac employees, basics employees, housekeeping employees, plant clerical employees, and maintenance men employed by the Employer at its Memphis, Tennessee distribution center; excluding all contingent, on-call and temporary employees, office clerical employees, professional and technical employees, truckdrivers, guards, and supervisors as defined in the Act.

## APPENDIX

*Objection 3:*

In this objection, the Employer contends that the Union, through its representatives and in-plant agents, injected racial and religious prejudice and hatred into the organizing campaign by making improper and inflammatory racial and religious statements and appeals. The statements which are the subject of this objection are basically undisputed.

Edgar E. Barton, the Steelworkers International representative who directed the Petitioner's organizing campaign, testified credibly with regard to remarks that he made at a meeting of employees which occurred on Saturday, February 19, 1994, with approximately 40 employees in attendance. Barton testified that a question came from the floor regarding Company Attorney Arnold Perl. An employee asked if Perl was Jewish and Barton replied, ''Yes, he is.'' Barton continued, ''[A]nd I think he has a Jewish law firm.''[4]

Barton asserts, ''I went ahead to tell the people at that meeting that it had been my experience over the years as a union rep that Jewish people would fight you and they would fight you hard, but when you beat them, they would sit down and negotiate a contract with you.''

Barton also testified with respect to another incident which, according to his recollection, occurred during either the first or second organizational meeting held in January 1994 at the Holiday Inn. According to Barton, one of the nine employees in attendance at that meeting advised Barton

[1] The Employer thereafter filed a request for the Board to take administrative notice of the recent court decision in *KI (U.S.A.) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994), as it pertains to its objections.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the Employer's Objections 2 and 4 be overruled.

[4] The relevant portion of the hearing officer's report is attached.

[4] At the hearing, the parties stipulated that the two founding partners of the Young and Perl law firm, and four of six current partners, are of the Jewish faith.

that Catherine's was a ''Jewish company,'' and that Bernie Wein, Catherine's chief executive officer, was Jewish.[5] Barton asserted that he made a note with respect to this because, ''I was concerned about gathering information on the Company. It really didn't make any different to me whether it was Jewish or not Jewish, or anything else.'' Barton claimed that other than these two instances, there were no other meetings where either he or Danny Johnson, who assisted him in the organizing campaign, made any remarks concerning the Company, or the Company's law firm being Jewish. Barton additionally asserts that this was not an issue of discussion at any of the nine organizational meetings that the Union had during the preelection period and was not a topic of discussion among employees at the Union's meetings.

In response to a question from Employer's counsel, Barton specifically denied that he, Danny Johnson, or any of the employees ever made remarks to the effect, ''Jews don't like (or trust) blacks.'' Also in response to questioning by Employer's counsel, Barton denied that he or Johnson ever made remarks during the campaign concerning the Employer's failure to pay employees an anticipated wage increase by commenting words to the effect, ''It's because the Company hired Jewish lawyers.''

With regard to the allegations of the interjection of racial prejudice in the preelection campaign, the Employer, while questioning Barton, inquired as to whether Barton had ever made a statement to the effect that, ''A no vote is a white vote.'' Barton remarked that he had, in fact, made a similar remark. He noted that this remark occurred in the context of a review of the *Excelsior* list with a number of employees at one of the Union's Saturday afternoon meetings. Barton claims that upon receiving the *Excelsior* list, he noticed that certain individuals' names were not on the list, specifically individuals whom the Union believed were plant clericals. Barton then called the NLRB Regional Office and the Board phoned back with a list of seven names, who are essentially the seven clerical employees whose ballots were challenged at the election, and whom I have previously determined are eligible plant clerical employees. Three of these individuals, Felecia Jackson, Inez Taylor, and Janet Tillman, are African-Americans. Four of these individuals, Sandra Loudermilk, Lynn Spees, Gail Bartram, and Sherri Walker, are white.

Barton notes that he asked the employees present at the meeting about Loudermilk, Spees, Bartram, and Walker with whom the Union had no prior contact. Barton remarked to the employees in attendance at the meeting that he believed that these four white employees were office clericals, not plant clericals, and further remarked that if the Company had placed them on the list, they were ''no'' votes. Barton contends that he remarked to the employees present, ''Those four white ladies are 'no' votes.''

Barton also testified with regard to the Union's strategy during the organizing campaign,

> I had a strategy from the start up here on this campaign and I stick to that strategy from day go until day end. I didn't want anything to detract from my strategy that I had planned from the first meeting that I had set up here and the second meeting—especially after the second meeting—of which I had to do here to try to put a union in Catherine's, Inc . . . I felt that it was 98 percent black and all the information I had—until we got to the hearing on February 1—was that if the people stick together, they'd have their union. That was the theme at every meeting I had, 'if we all stick together, you'll have your union.
>
> I never mentioned black. I didn't have to because it was 97, 98 percent black.[6]

In response to questioning by Employer counsel, Barton denied making comments to the effect, ''a no vote is a white vote'' or ''a white vote is a no vote.'' Barton also denied hearing anyone make a statement that if employees supported the Company, they were Uncle Toms, crossovers, or sellouts.

Barton testified that the issues in the campaign were money, benefits, and the 1,000-hour requirement to work there before becoming a full-time associate, and that race was not an issue during the campaign. During the campaign, the Union distributed numerous pieces of literature, which have been introduced into evidence as Petitioner Exhibits 7-1 through 7-42. A careful review of this literature used by the Union during the campaign fails to disclose any references with respect to race, or with regard to the religion of company officials or members of the Employer's law firm.

During the hearing, the Employer presented several employee witnesses to testify with respect to alleged anti-Semitic and racially provocative remarks that they allegedly overhead at the Union's organizing meetings, and the impact that these remarks had on the bargaining unit. Robert Paynes, who is employed in the shipping department, testified at length with regard to this issue. Paynes contends that he attended a meeting where Union Representative Barton remarked that the Company was a Jewish company and that thereafter, an employee present named Pearl (whom we now know to be Pearline Gladney, a bargaining unit employee) also commented that the Company was Jewish, that they had Jewish lawyers. According to Paynes, either Barton or Gladney (he was unable to distinguish which) made remarks to the effect that Jews don't like whites and blacks. During this conversation, Union Representative Barton allegedly commented to the assembled employees at this union meeting that he would not lie to them because he was white.

According to Paynes, at this meeting and after the above-referenced remarks were made, just about everyone present was talking about the Jews, making remarks to the effect that the Company was Jewish. These remarks occurred not only in the meeting room but out in the hallway, although Paynes concedes that neither Union Representative Ed Barton nor Steelworkers Organizer Danny Johnson was present during the comments made in the hallway. Paynes also asserts that he heard Pearl (Gladney) remark words to the effect, ''Blacks have to stick together.'' Supposedly, Gladney made this remark in the context of discussing the fact that black employees at Catherine's were not permitted to use certain bathrooms.

[5] The parties have stipulated that, in addition to Wein, Company Executive Vice President Stanley Grossman, Senior Vice President and Director of Stores Jim Spector, Distribution Center Manager Barbara Talan, and Director of Planning and Distribution for Virginia Specialities Jack Talan are all of the Jewish faith.

[6] The parties stipulated at hearing that all but two of the eligible voters on the *Excelsior* list were African-Americans.

After this meeting, according to Paynes, he heard employees at the workplace use the term ''Uncle Tom'' to reference other employees who did not support the Union. Evidently, however, Paynes did not attach any significance to this expression since the term had been used at Catherine's before the Union's organizing drive and was, in his words, ''a regular word.'' Paynes also asserts that after this meeting and, upon returning to work, he continued to hear talk in the workplace about Jews and discussions to the effect that the Company had given $4 million to a Jewish charity but was not going to give the employees anything. According to Paynes, an article from the Memphis ''Commercial Appeal'' newspaper was passed around, to the effect that the Company had given away the $4 million, at the same time granting the employees no wage increase.

Finally, Paynes testified to a threat allegedly made by Pearl (Gladney), who assertedly remarked, ''Robert, I heard you wasn't [sic] for the Union. You knew we need that Union in here.'' As Paynes walked away, Pearl (Gladney) allegedly pointed at him and remarked, ''Robert, I ain't playing about that mother-fucking shit.'' Paynes' reaction to this alleged threat was to report the incident to Human Resources Manager Rex Gipson and to advise Gipson that he would hit Pearl in the face if she didn't stop bothering him.

To the extent that Paynes' testimony conflicts with that of Union Representatives Barton and Johnson and with the testimony of Pearl Gladney, which will be discussed later, I discredit Paynes. Paynes was probably the least coherent witness I have ever had the misfortune to hear in more than 20 years with the Agency. As the transcript demonstrates, he appeared to have extraordinary difficulty in comprehending questions posed to him, requiring that questions be rephrased and repeated several times. Even then, I cannot be confident that Paynes understood all of the questions that he was asked. Additionally, after being asked a question, Paynes deliberated an inordinate amount of time prior to answering. Whether this was merely to provide himself an opportunity to compose his thoughts or whether he was attempting to recall answers that may have been suggested to him by someone in preparation for the hearing I am unable to say. It is sufficient to note, however, that Paynes' lack of spontaneity in responding to questions causes me to doubt his veracity. Finally, when Paynes did eventually respond to questions, his lack of command of spoken English and his habit of making evasive and nonresponsive answers essentially rendered his testimony useless.

The Employer called employee Peggy Bell, who works as an order puller, to testify about remarks that she had heard at the Union's organizing meetings, and the repetition of those remarks at the workplace. Bell attended a single meeting which she believes was held about the second week of March, which was presided over by Union Representative Barton. Bell recalls that Barton made a remark at this meeting to the effect, ''A white vote is a no vote.'' Under cross-examination, Bell recalled that this remark was made in the context of a discussion of voting eligibility and that the employees present at the meeting were discussing the issue of who was and who was not eligible to vote. Bell admitted, under cross-examination, that after this meeting and after she returned to the plant, there was initially no mention on the plant floor that ''a white vote was a no vote,'' nor was there any mention in the breakroom about Barton's remark. Bell, however, asserts that she mentioned the remark to several employees in the company parking lot. Finally, under cross-examination by the hearing officer, Bell recalled that at the meeting where Union Representative Barton made the remark, the eligibility of Sandra Loudermilk, Lynn Spees, Gail Bartram, Janet Tillman, Felecia Jackson, Sherri Walker, and Inez Taylor was specifically discussed and all of those individuals were mentioned by name.

I have no basis to discredit Bell's testimony, and basically she confirms what Barton already admits—that he characterized certain of the disputed clerical employees by race and implied that the disputed white clerical employees would be likely to vote against the Union.[7] The special significance of Bell's testimony is that she repeated the remark made by Barton to only a few of her coworkers.

Ultimately, the Employer called two other witnesses to testify regarding the issue of alleged racially inflammatory remarks in the workplace during the preelection period. Leon Davis, a shipping clerk in the pic-pac area, testified to a conversation that he had with Gwen Moss, who was discussed previously in this report, and whom I have determined is a leadperson and not a supervisor within the meaning of Section 2(11) of the Act. Davis testified that he was approached by Gwen Moss during his lunch period, prior to the election, and Moss asked him whether he was going to vote for or against the Union, and he advised her that he was going to vote against the Union. Then, according to Davis, Moss remarked, ''You're for the white man, you're for the white man.'' Approximately three other employees were present when Moss made this remark.

The Employer also called employee Regina Nelvis, who works as an unpacker and checker in the line area and who was an eligible voter in the election. Nelvis testified to a remark allegedly made by Pearline Gladney, a coworker. Nelvis testified, ''Well, I can recall her (Gladney) saying that black peoples [sic] need to stick together because white folks are not going to do anything for you.'' Nelvis also testified that prior to the union campaign, no one at Catherine's had ever said anything to the effect that black employees had to stick together against white employees in the workplace. Nelvis also testified, that during the campaign, Gladney made remarks concerning Catherine's' chairman, Bernard Wein, ''Well, he's Jewish. He don't care. He's got his pockets full. You're the one who need [sic] to try to make some money.''

While I have no basis for discrediting either Davis or Nelvis with respect to these offensive remarks about which they testified, I attach no legal significance to the remarks since I do not view Gwen Moss or Pearline Gladney as agents of the Union. The record is replete with evidence indicating that neither Gladney, nor Moss, nor any other of the seven leadpersons whom I have found not to be supervisors within the meaning of Section 2(11) of the Act, were designated by the Union as agents of the Union. Union Representative Barton testified, without contradiction, that the Union never designated any employees as in-plant organizers for the purpose of giving information or contacting the Union. All employees were given an equal opportunity to

[7] Given that no white employees had ever attended any of the Union's meetings, Barton's remark was an accurate, but inartfully worded, prediction of likely voting predilections.

sign the sign-in sheet to be members of the ''in-plant organizing committee.'' At the union meetings held during the preelection period, all employees present were given an opportunity to speak, and no employees were designated as spokespersons for the Union. Additionally, the testimony is uncontroverted that there were no special meetings held for volunteer organizers, that there were no separate meetings held for any members of the ''in-plant organizing committee,'' other than the regular Saturday meetings open to all employees, and no special instructions given to the volunteer organizing committee. No volunteer organizers were paid by the Union or authorized to incur expenses on behalf of the Union.

It is also clear that neither Gwen Moss nor Pearline Gladney ever told employees that they were union organizers, that they were speaking on behalf of the Union, that they were getting paid by the Union, that they were being reimbursed for expenses by the Union, or that either Ed Barton or Danny Johnson authorized them to make these remarks. I find a similar lack of [sic] agency with respect to any conduct assertedly engaged in by any of the other leadpersons, whose ballots were challenged and who were discussed previously in this report.

The Board has held that where the Union conducts its campaign through full-time staff organizers, but where employee members of the in-house organizing committee make prejudicial or inflammatory remarks against the Employer, such slurs on the race, religion, or ethnic background of the Employer's owners or managers do not constitute a basis for setting aside the election, where there is no evidence that the Union authorized or condoned these offensive sentiments and where, as here, the Union's campaign literature did not echo these offensive remarks. *Benjamin Coal Co.*, 294 NLRB 572 (1989); *Advance Products Corp.*, 304 NLRB 436 (1991); *S. Lichtenberg & Co.*, 296 NLRB 1302 (1989). Accordingly, I find no evidence that Gwen Moss, Pearline Gladney,[8] or any of the other leadpersons were agents of the Union for purposes of any offensive remarks which they may have made during the preelection period, and find that their remarks do not bind the Union, nor do they constitute a basis to set aside the election conducted in this matter.

Having now cataloged all of the alleged offensive remarks made by union representatives or other individuals during the course of the campaign, it is now appropriate to consider whether these remarks constitute a basis for setting aside the election conducted in this matter. The Board, in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), held that, where a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals to racial prejudice, it would set aside the election. Certain Courts of Appeal have likewise stated that racial appeals have no place in elections. See, e.g., *NLRB v. Silverman's Men's Wear*, 656 F.2d 53 (3d Cir. 1981). In *Silverman's*, the employer alleged that the union infected the election atmosphere with religious prejudice and intolerance when the union's secretary-treasurer referred to the employer's vice president as a ''stingy Jew'' at a meeting of 20 employees held 6 days before the election. The Third Circuit found that the employer's allegations, if true, would warrant a new election, assuming the remarks had a significant impact on employees' free choice. Similarly, in *YKK (U.S.A.)*, 269 NLRB 82 (1984), the Board found a basis to set aside the election where the union embarked upon a campaign of slurs directed toward the Japanese management of the employer.

On the other hand, in a case perhaps more reflective of the racial climate found here in Memphis, Tennessee, *Coca-Cola Bottling Co.*, 273 NLRB 444 (1984), the Board found that the union's campaign which involved remarks directed to black employees concerning their perceived relationship with their employer as employees and their dissatisfaction with the terms and conditions of employment did not inflame racial hatred or engender conflict between black and white workers. In *Coca-Cola*, the union representative remarked to an employee that the company had kept blacks down for a long time, and now employees had a chance to take care of it. The union also made references to ''plantation'' and ''Martin Luther King,'' which the Board found simply put these matters in a historical setting well understood by all, blacks in particular. The Board also found that the union representatives chastising employees for handing out ''white man's material'' or advising employees handing out procompany literature that they were ''just a white man doing white man's work,'' merely indicated distrust for the motives of the distributing employees because of the perceived advantage resulting from race. In *Coca-Cola*, the Board noted that such comments were representative of the views of black employees, that they had not been treated fairly because of their race, and the Board therefore overruled the employer's objections to the election.

Similarly, the Board has held that where one African-American employee refers to another as an ''Uncle Tom'' or ''house nigger,'' and where such remarks were intended to convey the impression that the procompany employee was exhibiting a master-servant type of mentality, such remarks do not constitute objectionable conduct. *Vitek Electronics*, 268 NLRB 522, 527–528 (1984). In many respects, remarks allegedly made in the instant case by Pearline Gladney and by Gwen Moss are essentially of the same sort as were made in Vitek and therefore would not constitute a basis to set aside the election, even if Gladney and Moss were agents of the Union, which I have concluded they are not.

With regard to the remarks made by Union Representative Ed Barton concerning the fact the Employer's law firm was a Jewish law firm and remarks made by Barton, or by employees to the effect that the Company was a Jewish company, I would urge that such remarks do not constitute a basis for setting aside the election since they do not rise to the level of religious slurs, and were neither intended to nor had the effect of infecting the election atmosphere with religious prejudice or intolerance. While the religion of the Company's officers, and of its attorneys, is an irrelevant issue to the campaign, and while Barton's remarks are politically incorrect, it should be noted that these remarks by Barton were initiated by employee questions and that the issue the faith of the Company's officers and attorneys was not a recurrent or persistent theme throughout the Union's campaign, nor was it the subject of the Union's literature. In an ironic way, Barton's comment concerning his past experience with lawyers of the Jewish faith constitutes a compliment

[8] The Employer attaches great significance to the fact that Gladney, at the union meeting attended by Robert Paynes, stood while speaking. The record reflects that this was due to a shortage of chairs and not because of any leadership role.

with regard to the likelihood that the Employer's law firm would engage in good-faith bargaining if the Union were successful in prevailing at the election. Thus, I reject the argument advanced by Employer's counsel in its brief and find no evidence that the Union embarked upon a racially oriented strategy to set the black employees against the Employer by injecting a ''Jewish issue'' into the campaign. In conclusion, I find that the remarks made by Barton and by various employees concerning the religion of certain of the Company's officers and certain members of the Employer's law firm did not have a significant impact on employees' free choice. Accordingly, I recommend that Objection 3 be dismissed.